

STATE OF ALASKA
COMMISSION ON JUDICIAL CONDUCT
In the Matter of the Proceeding)
Pursuant to A.S. 22.30.011(a))
in Relation to:)
RICHARD POSTMA,)
Judge of the District Court,) ACJC File No. 2010-005
Third Judicial District at)
Anchorage, Alaska.)

DEPOSITION OF MARLA GREENSTEIN
December 2, 2010

APPEARANCES:

FOR JUDGE POSTMA: MR. THOMAS V. VAN FLEIN
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness, LLC
Attorneys at Law
711 H Street
Suite 620
Anchorage, Alaska 99501
(907) 272-9272

FOR THE ALASKA
COMMISSION ON
JUDICIAL CONDUCT: MR. MATTHEW D. JAMIN
Law Office of
Matthew D. Jamin
Attorneys at Law
323 Carolyn Street
Kodiak, Alaska 99615
(907) 486-6024

ALSO PRESENT: JUDGE RICHARD POSTMA

* * * *

PURSUANT TO NOTICE, the deposition of MARLA GREENSTEIN was taken on behalf of Judge Richard W. Postma, before Sharon Wilcox, a Notary Public in and for the State of Alaska and Reporter for Metro Court Reporting, at Clapp, Peterson, Van Flein, Tiemessen & Thorsness, 711 H Street, Suite 620, Anchorage, Alaska on the 2nd day of December 2010, commencing at the hour of 9:06 a.m.

* * * *

TABLE OF CONTENTS

Direct Examination by Mr. Van Flein 4

EXHIBITS

PAGE

(No exhibits marked at these proceedings)

* * * *

P R O C E E D I N G S

(On record)

COURT REPORTER: Good morning, we're on record.

My name is Sharon Wilcox, I'm a court reporter with Metro Court Reporting, 121 West Fireweed Lane, Suite 260, Anchorage, Alaska. Today's date is December 2nd, 2010 and the time is approximately 9:06 a.m. We are at the offices of Clapp, Peterson, Van Flein, Tiemessen & Thorsness, 711 H Street, Suite 620, Anchorage, Alaska for the deposition of Marla Greenstein. This matter is in the State of Alaska, Commission on Judicial Conduct, In The Matter of the Proceeding Pursuant to Alaska Statute 22.30.011(a) in Relation to Richard Postma, Judge of the District Court, Third Judicial District at Anchorage, Alaska, ACJC File Number 2010-005.

Ma'am, would you please raise your right hand so I can swear you in?

MS. GREENSTEIN: I do.

(Oath administered)

MARLA GREENSTEIN

having first been duly sworn under Oath, testified as follows on examination:

COURT REPORTER: Thank you. Please state your full name and spell your last for the record.

A My name is Marla Greenstein, G-r-e-e-n-s-t-e-i-n.

COURT REPORTER: May I have a mailing address

1 Q And did Ms. Kolberg attend any Commission meeting?

2 A Yes. And so probably was that initial -- and that
3 would have been the most likely one.

4 Q And do you recall was that recorded testimony?

5 A We record all our meetings, yes.

6 Q Okay. Do you know if that's been produced in this
7 litigation, her testimony?

8 A We typically have not produced in any disciplinary
9 matter the actual audio recording of the closed session
10 where the judge has not been present.

11 Q How come?

12 A How come?

13 Q Yeah.

14 A I think it's probably viewed as deliberative on the
15 part of the Commission.

16 Q Okay. The witness testimony is deliberative?

17 A It's not testimony, it's not sworn, it's just the
18 complainant having their opportunity to tell the
19 Commission anything that they believe should -- should
20 be considered before acting on their complaint.

21 Q So the witness is not sworn into the Commission?

22 A It's not -- the person's not viewed as a witness, it's
23 viewed as the complainant's opportunity to basically
24 just inform the Commission of anything that they feel
25 may have been overlooked and why the complaint should

1 not be dismissed.

2 Q Okay. So is the complainant given a heads up at that
3 point that your recommendation as the investigator is
4 to dismiss it, so they get the opportunity to go and
5 object, is that sort of the process?

6 A If I do make a recommendation to dismiss, I would say
7 that in the letter to the complainant, yes. If the
8 recommendation is something other than dismissal, but
9 we -- we want to be vague about it, we use other
10 language. Something like the Commission will act on
11 your complaint, but dismissal may be one outcome
12 because I don't know ahead of time what the Commission
13 will do.

14 Q And here do you recall what you told Ms. Kolberg ahead
15 of time?

16 A I do not.

17 Q Do you recall what Ms. Kolberg told the Commission when
18 she appeared?

19 A It was basically a reiteration of her written
20 complaint, there was nothing new or different.

21 Q Okay. And then do you get to provide, since we're not
22 calling it testimony, information as to what you
23 learned? After the complainant talks about the
24 complaint, then do you provide oral supplement to your
25 written report to the Commission, or answer questions?

1 A Typically the way the meeting's structured is we have
2 all the complainant testimony in a block just to make
3 our meeting more manageable, so each complainant gets
4 10 minutes for their complaint, that the Commission is
5 going to consider that day. Then what's typical is the
6 Commission will consider each complaint separately
7 after that group of people have provided information,
8 one complainant at a time. If they have questions,
9 they answer their questions. Apart from the written
10 materials, it's unu -- I would say it's unusual for me
11 to provide a verbal summary unless they ask a question,
12 but if they ask me questions, I certainly do answer
13 them.

14 Q And so in this case with Ms. Kolberg what was the
15 outcome of your meeting with the Commission after her
16 presentation?

17 A I honestly don't recall. I would need to look at our
18 meeting minutes or a file document to let you know.

19 Q And Judge Postma was not -- did not attend?

20 A Correct.

21 Q And did not provide information?

22 A He provided written information, I believe.

23 Q Okay. You don't recall if there was a motion to
24 dismiss, or table, or.....

25 A I would -- I would need to look at the materials, I

1 Q If the presiding judge, whether it be Judge Gleason or
2 Judge Christian, or anybody else, if it's not part of a
3 formal process do you have to get a waiver from either
4 the subject of the complainant, or the complainant,
5 because my understanding is the process is
6 confidential.....

7 A Right.

8 Quntil it's made public?

9 A Right.

10 Q So how are you able to speak with a presiding judge
11 without violating the confidentiality provisions, I
12 guess?

13 A I'm careful in what I share with the presiding judge
14 but they know that it's a confidential matter. I don't
15 share typically, I mean, this instance it was a little
16 different, but typically they wouldn't know the
17 complainant's name. If there is a case that we need to
18 track to see where it's at, they obviously need to know
19 that. But they -- they can help me in my investigation
20 in terms of access to files and tracking judges with
21 ongoing case management problems, or whatever it may
22 be, so it's a close working relationship and they
23 maintain the confidentiality.

24 Q Okay. Are the -- is the presiding judge ever asked to
25 assist in a sense, you said to track cases or to pull

1 Q Or any member of the Commission to your knowledge?

2 A Not to my knowledge.

3 Q So do you recall the nature of the complaint that Judge
4 Postma -- you said it was late in the process, but do
5 you recall the nature of the complaint?

6 A It was -- yes, I mean, in general terms it was
7 allegations that Judge Gleason and Judge Hanley
8 violated various employment law responsibilities
9 towards him and revolved around allegations of racial
10 discrimination.

11 Q Let's just hypothetically assume there was racial
12 discrimination by a courthouse employee against a
13 judge. Is that something that your Commission would
14 look at?

15 A No.

16 Q And why not?

17 A Because, if I'm understanding your question -- well,
18 first of all, when you say a court employee I'm
19 assuming that's not a judge, so we have no authority
20 over non-judicial employees.

21 Q Okay. What about in the context of this category we
22 were talking about earlier of that everyone's got to
23 get along. The judicial canon says you gotta get along
24 with everybody. If a judge believes someone is acting
25 in a discriminatory manner, let's say it's a female

1 judge who thinks a male court employee is sexist and is
2 demeaning towards her, and it causes a problem in the
3 work relationship, which then implicates, if I
4 understand your testimony earlier, your Commission,
5 because now we have a bad working relationship. How
6 does the Commission deal with something like that or
7 has it?

8 A With the judge accusing a court employee of --
9 Q Sexist behavior.....

10 A That's.....

11 Qthat deteriorated a working relationship?

12 A That would be a matter for court personnel, the human
13 resources department of the court.

14 Q Okay. And what if that employee says, I'm not sexist,
15 I like women, this woman judge is just too sensitive
16 and I want to file a complaint because she's too
17 sensitive. Then that -- and has a bad working
18 relationship with me now, does that then go back to
19 your Commission?

20 A Yes.

21 Q And then so really there's only -- it's kind of a one-
22 way street, it sounds like?

23 A Correct.

24 Q Only the employee's complaint against the judge can be
25 reviewed?

1 This judge just reprimanded me twice in one day for the
2 way I talk and I -- that's the way I talk, this judge
3 must not be a good person. How do you balance that?

4 A Well, the facts of the investigation would ferret that
5 out so if it's -- the facts are as you stated, yes, we
6 would get the complainant, we would probably do some --
7 you know, do whatever preliminary investigation we did
8 to see what the details were. If the judge handled it
9 appropriately, it would be dismissed.

10 Q Okay. In Judge Postma's case, did you ever review any
11 of his concerns regarding Ms. Kolberg in terms of if
12 she's complaining about a bad working relationship, did
13 you ever look into it from his perspective why there
14 might be a bad working relationship?

15 A I -- I'm not concerned with -- with the whys of a bad
16 relationship as part of an investigation, I'm concerned
17 with the judge's responses to -- to the circumstances.
18 So whether the judge responds in a temperate, measured
19 way or whether the judge's responses are other than
20 that.

21 Q So just so I have clarity on this, if you find in an
22 investigation that an employee has said or done
23 something offensive to a judge, that still is not
24 within your purview necessarily. But the judge's
25 response to that offensive conduct would be?

1 A Correct.

2 Q And if the judge over-reacts or reacts, then that could
3 be within your parameters of an investigation?

4 A Yes.

5 Q Okay.

6 MR. VAN FLEIN: All right, we're going to take
7 a five minute break.

8 A Okay.

9 (Off record)

10 (On record)

11 MR. VAN FLEIN: Ready when you are.

12 COURT REPORTER: We're back on record.

13 Q (By Mr. Van Flein) Okay. I gotta say I'm a little bit
14 surprised at the nature of the process so it's been
15 good for me to talk to you. In the one-way nature of
16 the process, that if there's discrimination by
17 employees, that really your hands are tied is what it
18 sounds like?

19 A I wouldn't phrase it that way, I think it's more that
20 our affirmative obligation under the statute is to
21 address judicial conduct, and so that's our only focus.

22 Q Okay. And I was thinking about that because, you know,
23 I don't know if it's ever happened or ever will happen,
24 but just, you know, hypothetically say we have a Jewish
25 American judge and then we have a judicial assistant or

1 some in-clerk who is a Holocaust denier and makes
2 statements occasionally. And at some point the judge
3 loses his or her cool and says, that's outrageous, I
4 had grandparents who died in the Holocaust.

5 Potentially -- and yells at the employee, we'll say,
6 just loses his or her temper. Potentially the judge
7 could be disciplined for losing his or her temper, even
8 though provoked in a sense by a court employee who has
9 racist tendencies. That's sort of what I gather out of
10 this, that it's the judge's reactions that are
11 measured, not the provocation?

12 A Right. And, you know, judges that have those
13 expectations of themselves in the courtroom, so it does
14 extend beyond the courtroom.

15 Q Yeah.

16 A That's accurate.

17 Q And so -- and the same could be true if it's an African
18 American judge, and for whatever reason they get a --

19 A A White Supremist.....

20 Q A White Supremist judicial assistant who makes it clear
21 what he or she thinks of African Americans. If the
22 African American judge reacts to that provocation by
23 sending a nasty e-mail, you know, saying this is
24 unacceptable, exclamation, exclamation point, all caps,
25 or something, I don't tolerate this kind of stuff, you

1 about this elevator incident, that that's one of the
2 examples of in-person anger. Who was the person in the
3 elevator that told you about this incident?

4 A The person didn't tell me, it was reported in another
5 way and I don't recall -- and I don't recall her name,
6 but she was another court employee.

7 Q Okay. So it sounds like it's double hearsay to you?

8 A Yes.

9 Q Somebody told -- this person told somebody else and
10 that person then told you?

11 A Yes.

12 Q Okay. And did you think it was important enough to
13 interview that person in the elevator?

14 A Early on in this investigation I made a decision not to
15 interview any court employees apart from the
16 complainant.

17 Q And why is that?

18 A Because of the nature of the difficulty of working with
19 people that when an investigation like this is ongoing
20 and you want to preserve that employment relationship
21 as best as possible.

22 Q Between the judge and these people or between yourself
23 and these people?

24 A Between the judge and the -- and the court working
25 environment. So I restricted my communications -- one

1 of the reasons I used communications with the presiding
2 judge more in this instance than I would possibly in
3 another type of investigation is to -- to avoid having
4 the need to bring in other court employees into the
5 investigation.

6 Q Okay. So was it the presiding justice that informed
7 you of the elevator incident, is that what you're
8 saying?

9 A You know, I don't recall -- I don't recall the source
10 of that information.

11 Q Do you recall what happened in the elevator, what the
12 circumstances were that were being reported?

13 A I believe Judge Postma described it in a meeting with
14 the Commission, so I recall that more specifically.

15 Q And was there yelling?

16 A No.

17 Q Was there fist pounding?

18 A No. It was -- as I think I'd describe it as a general
19 change of demeanor where I believe the judge described
20 as his having an anxiety attack that was interpreted by
21 the other person as something different than an anxiety
22 attack. Where he would get very red-faced and perspire
23 and the observer viewed that as anger.

24 Q Okay. But nothing was said by the judge to this
25 employee?

1 A I don't recall anything being said.

2 Q And nothing was done by Judge Postma to this employee?

3 A No.

4 Q No actions?

5 A No.

6 Q So it's just Judge Postma had a -- was red in his face
7 and perspiring?

8 A Yes.

9 Q And the witness thought the judge must be angry?

10 A Yes.

11 Q Okay. And is that an issue in this case, is this an
12 element of the charge that he has anger management
13 problems?

14 A I would -- yes. Yes, that's an element of this -- in
15 this case mainly because of the e-mail correspondence
16 and the other interactions that were -- I mean, another
17 one that I recall is the hallway incident with Judge
18 Hanley early on about leave, so that's.....

19 Q Okay. We'll get to that.

20 Aanother anger --

21 Q More specifically is the elevator incident a part of
22 the factual basis in this case to discipline Judge
23 Postma for anger management?

24 A That may be an element of it. This case is complicated
25 in that we have both mental health issues and conduct

1 required by District Court, just, you know, the weeks
2 of leave, the medical -- the mental health
3 appointments, the -- I think that's probably the most
4 disruptive.

5 Q Okay. And that's a little bit, I understand that,
6 that's a little bit different than what I was asking.
7 I was looking for in your mind what's the most
8 unmeasured, we're talking about unmeasured responses.
9 What's the most unmeasured response you can think of
10 that stands out to you after all this time dealing with
11 this case with Judge Postma that he authored or did
12 that just stands out -- if you had to give one example
13 as, boy this is just crossing the line -- let's say
14 you're going to use Judge Postma's case to educate
15 future judges. What would be the worst example you'd
16 say, this is what Judge Postma said one day and this is
17 what you can't do.

18 A Some of the worst stuff in my mind is much more recent
19 than what's in here, so --

20 Q You mean stuff that's not even in the complaint?

21 A Yes. Yeah.

22 Q Okay. That you mean the -- the campaign for retention?

23 A The elements around that and there's a federal lawsuit
24 that recently was filed that is problematic. So -- so
25 those are the most recent. But in terms of his conduct

1 at issue before the Commission, once again, it's an
2 escalation of responses to changes and accommodations
3 the court was attempting to make that I -- I'm not
4 comfortable singling out any single event, because it
5 really is a pattern of conduct and an escalation of
6 behavior.

7 Q Okay. And just so I can put it into context, the fact
8 that he filed a federal lawsuit is also in your mind
9 evidence of lacking judicial temperament?

10 A It's the content, not the fact itself, it's the
11 content.

12 Q The content of the complaint?

13 A Yes.

14 Q And I haven't read the complaint, is there something
15 that stands out in there to you?

16 A I don't want to paraphrase it, I suggest you look at
17 it.

18 Q Okay. I take it the Commission doesn't take issue with
19 his right to file a complaint?

20 A To file a --

21 Q A federal complaint? If I -- in fact, earlier I
22 thought you said that may be his only remedy, the
23 Commission can't deal with his complaints about others,
24 it can only deal with complaints from others about him.
25 So I'm assuming you don't -- as a Commissioner, or as

Page 81

1 A Or -- or the existence of a complaint against a court
2 employee, for example.

3 Q Existence of what type of complaint?

4 A A personnel complaint.

5 Q Okay. But not a public complaint, not a lawsuit,
6 that's obviously a public record?

7 A Assuming the public lawsuit doesn't violate that
8 person's confidentiality, right? Yeah, I'm assuming
9 that, but --

10 Q Okay.

11 A I mean, I -- I just don't want to -- I just don't want
12 to say blanket just because it's in a lawsuit it's
13 okay.

14 Q Okay. And in this case are you aware of any
15 disclosures by Judge Postma that you found didn't fall
16 within the exception of the subject of the complaint
17 allowing to make public release of information?

18 A Yes.

19 Q And what is that?

20 A All my investigative memoranda that have been attached
21 and publicized on the judge's retention website and now
22 as attachments to both a state lawsuit and a federal
23 lawsuit.

24 Q Okay. And in your view, those memoranda still to this
25 day should be confidential?

METRO COURT REPORTING EXHIBIT 9

1 A Yes.

2 Q And if they're an important part of Judge Postma's
3 defense of his reputation, you don't think those
4 interests trump whatever confidentiality you might
5 want?

6 A No, they do not.

7 Q You don't think his First Amendment right to speak
8 would trump that?

9 A No.

10 Q Just as we mentioned earlier when it came to
11 complainants who you've told the complaint is
12 confidential but they nevertheless could talk about it,
13 you mentioned that they had a First Amendment right to
14 speak anyways without retribution?

15 A The judge has the right to talk about the charges and
16 his answer to the charges.

17 Q Okay. And you don't think a judge has a right to
18 provide evidence to support what he's talking, he or
19 she is talking about? It's one thing to say I'm being
20 unfairly charged, right? It's another thing to try to
21 prove that to the voters by evidence, don't you think?

22 A Those -- the documents we're talking about are labeled
23 confidential memorandum, they're confidential under
24 state statute and -- now there may be other statements
25 the judge can make about the investigation, but not

1 release of those confidential memoranda, no.

2 Q Did you provide copies of those memoranda to anybody
3 outside of your Commission?

4 A You.

5 Q Okay. Anybody else?

6 A No -- Mr. Jamin.

7 Q How about anyone on the Alaska Judicial Council?

8 A No.

9 Q Do you know if they have them?

10 A They do not have -- well, they only have them now
11 because the judge attached them to various attachments
12 that he sent to the Com -- the Judicial Council.

13 Q But prior to that do you know if any member of the
14 Judicial Council had your memoranda?

15 A They did not.

16 Q How about the medical reports like Dr. Millner's
17 report?

18 A They received Dr. Millner's report under a waiver that
19 the judge had signed granting the ability to share the
20 medical information with the Judicial Council for his
21 retention purposes.

22 Q Okay. So the Millner report fell within that written
23 waiver?

24 A Yeah. That's the only actual document that the
25 Judicial Council received.

1 (Whispered conversation)

2 Q Okay. Do you recall the chronology of when Judge
3 Postma signed the waiver versus when Dr. Millner's
4 report was created?

5 A It was prior to that.

6 Q Okay. Was it long prior?

7 A It was January, I believe, and Dr. Millner's interview
8 with the judge was in March.

9 Q And did you reconfirm with Judge Postma or -- he had an
10 attorney then too, Mr. Feldman, right?

11 A I'm not sure at what point Judge -- Mr. Feldman stopped
12 representing him, so I -- in January at the time that
13 we signed the waiver, yes.

14 Q Okay.

15 A I'm not sure whether Mr. Feldman was still representing
16 him when Dr. Millner did her evaluation.

17 Q Okay. Did you reconfirm or get a new release from
18 Judge Postma with respect to Dr. Millner's report?

19 A No.

20 Q Since it didn't exist when he signed the prior
21 document?

22 A No.

23 Q How come?

24 A Viewed that his prior release that spoke to sharing the
25 information with the Judicial Council would cover that.

1 Q Even documents that hadn't yet been created?

2 A Yes.

3 Q No matter how personal or private?

4 A I can't make that statement, that was specific to
5 medical.

6 Q Okay. Any other documents that you shared with the
7 Judicial Council?

8 A No. I -- according to our rules for retention purposes
9 we require a waiver that the judge signed, it allows me
10 to provide to the Judicial Council a summary of the
11 status of any ongoing investigation. So it was a one
12 page, maybe two pages, two page summary that summarized
13 the -- the nature of the allegations and where we were
14 in our process. And I attached Judge Millner's (sic)
15 report to that summary and it was sent with a cover
16 letter to the Chief Justice and Larry Cohn with a
17 notation that these were confidential documents
18 pursuant to the waiver.

19 Q Okay. So a two page summary and then some documents,
20 the Millner report?

21 A Just the Millner report.

22 Q Just the Millner report, okay.

23 A That was all the other -- that was the only file
24 document they received.

25 Q And we're calling it the Millner report, there were

1 actually -- there was a supplement as well, right?

2 A Right. I think.....

3 Q So both?

4 A Yes.

5 Q Okay. And the two page summary, was that produced to
6 me, your two page summary, do you know?

7 A I don't know. There's no problem getting you a copy if
8 it wasn't.

9 Q Okay. It may not be called -- would it have been
10 directed to the Council itself?

11 A Yeah, with a cover letter. Would have been to Chief
12 Justice Carpeneti, with probably a cc to Larry Cohn.

13 Q Okay. And did you have any conversations with any
14 member of the Council in person or over the phone where
15 they followed up -- where they had questions for you
16 based on your memo or the documents you provided?

17 A No.

18 Q Or any e-mails from any Council member?

19 A No.

20 Q So nobody had any questions for you?

21 A I can't say that, but nobody communicated with me.

22 Q Okay. How about indirectly, did they communicate --
23 anybody communicate with you through your staff?

24 A No.

25 Q So you -- all you were able -- all you provided as far

1 as you in terms of information to the Council was your
2 memo, your summary, and both Millner reports?

3 A Right. And they wanted to know our timeframe -- at
4 some point they wanted to know our time frame.

5 Q That was a follow-up question?

6 A Yes.

7 Q Okay. And who was that from?

8 A It probably -- it probably came through Larry, it must
9 have been through Larry.

10 Q And I did ask you, members of the Council did -- you
11 have any discussions with Mr. Cohn from one Executive
12 Director to another, about Judge Postma beyond what you
13 provided in writing?

14 A Yes.

15 Q How many times?

16 A I'd say half a dozen.

17 Q And was this all prior to Judge Postma's retention
18 interview,.....

19 A No.

20 Qdo you know?

21 A I would say prior to the retention interview probably
22 two or three times.

23 Q And do you keep notes of your meetings with Mr. Cohn?

24 A No, I just keep the daily timesheet that shows, you
25 know, how I spend my day and stuff. I met with Larry